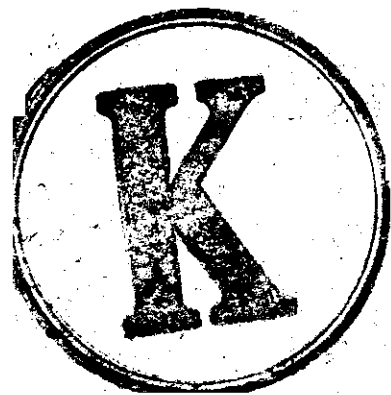




1951

File No. O. Contract

Legal Department.

51

A. BRANCH

Subject:— Opinions under the

P 28 E Indian Contracts Act, 1872

File No. O. Contracts/51.

Gen. 194 e.

235-A

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EVY. 12/7

Office of the R.L.A.

It appears that after the R~~aj~~ Palanpur State was integrated with the Bombay State, the Public Works Department Officer, Mr. Nussullamian called for open rates for the construction of a building at Deesa Aerodrome on 25-6-1948 and since Shri Kadia's rates were lower, his bid was accepted. He was ordered to finish the work immediately. There was no regular agreement executed between the parties but it appears that only rates were agreed upon without any reference to the total quantity of work to be done or the quantity to be done within a ~~given~~ given period. The contractor was, however, to be paid for the work done leaving a deposit of 10 percent. from the bill. After the contractor began the work and executed a part thereof, he was asked to stop the work in August 1948, probably on the ground that cement was not available and that the aerodrome was to be taken over by the Central Government. The contractor has not given a notice of suit claiming.-

- (1) Rs. 1,641 on account of materials lying at the site of ~~xxxx~~ aerodrome;
- (2) Rs. 155 on account of interest on the aforesaid sum from 1-9-1948 to 29-3-1950;
- (3) Rs. 187 for loss of interest on account of late payment for work done;
- (4) Rs. 50 for non-payment for "puran" work; and
- (5) Rs. 500 on account of damages for loss of profit.

The Public Works Department proposes to admit claim (1) in respect of Rs. 1,641 and claim (4) in respect of Rs. 50 and to disallow the rest on the ground that the contractor was not entitled to claim either interest or damages. R.L.A. is requested to advise whether the view taken by the P.W.D. is correct.

The contractor is obviously entitled to claim the value of the materials left by him at the site of the aerodrome and also for the work done. Consequently claim (1) and (4) are clearly admissible. Claim (2) would not

admissible as there was no agreement to pay interest on value of the materials. So also would claim (3) be inadmissible for there was no stipulation in the agreement for payment of any interest for late payment for work done. So far as claim (5) is concerned, it appears that the contractor would have been entitled to claim some compensation for the stoppage of work without previous notice provided the contract was for the construction of the whole work. But the Superintending Engineer, North Gujarat Circle, in his report at page 167 has stated that there was no contract for executing any definite quantity of work and that the contractor was to be paid only for the work that he executes. If this is correct, then the contractor would not be entitled to claim any kind of compensation in this respect.

The second question raised for the R.L.A.'s consideration is whether the liability to pay the contractor devolves on the Central Government. As pointed out by the R.L.A. in his last opinion No. 6908 dated 22-5-1950, under paragraph 7 of the States Merger (Governor's Provinces) Order, 1949, the Central Government would be liable provided it is relatable to the Central purposes. Aerodrome being a Central subject, the liability to pay the contractor would certainly be relatable to the Central purpose. Consequently, the Central Government will have to pay the contractor. Since, however, the contract was given after the integration of the Palanpur State, it would be deemed to be a contract between Shri Kadia and the Bombay State. Consequently, this Government may pay the contractor and claim recoupment from the Central Government.

Sd/-

Remembrancer of Legal Affairs.

U.R. to P.W.D., No. 891, dated the 15th January 1951.

Office of the R.L.A.

It appears that Messrs. Rajendra Bros. of which one Shri Sunderlal is the Sole proprietor has entered into a contract with the State of Bombay for the supply of salt for the Fish Curing Yards at Ratnagiri. The said contract was executed on 30th September 1950 and has been signed by Shri Sunderdas and witnessed by one Shri M.R. Kapoor. It has been stated that Shri Sunderdas is not able to read or write English and has therefore engaged the said Shri Kapoor as ~~xxxx~~ manager in June 1950 who has since been attending to the work of the firm. One day Shri Kapoor was introduced to the office of the Director of Fisheries by Sunderdas as his manager who would be attending to all transactions in respect of the supply of salt under the aforesaid contract. Since then Shri Kapoor has signed documents involving financial commitments on behalf of the firm. All bills tendered by the firm to the Director of Fisheries for payment under the contract bear his signature and on about ten such bills payment has been made to him by crossed cheques in favour of Messrs. Rajendra Bros and he has passed stamped receipts for the same. It appears that on 19th June 1951 a bill for Rs. 13814 was preferred by the Director on the Accountant General Bombay for payment to the firm. The bill was passed and a cheque in favour of the Personal Assistant to the Director of Fisheries was received in the Director's office on 25th June 1951. The circumstances under which the normal procedure was deviated in this case, by the Accountant General, are not known. On 26th June 1951 Shri Sunderdas accompanied by his manager Shri Kapoor called at the office of the Director for payment. However, as the cheque was in favour of the P.A. to

the Director they were informed that the payment ~~x~~ would be made after the cheque is cashed. Shri Kapoor alone presented himself the next day, 27th ~~xxx~~ June, and the payment was made to him in cash on production of a duly stamped receipt on behalf of the Firm. Shri Kapoor however did not credit the amount to the firm and has misappropriated the sum. Shri Sunderdas has now complained that the Director had no authority to make payment in cash to his manager; that this departure in the mode of payment was not unusual and improper; and that he would hold the Director responsible for loss occasioned to him by this departure. The R.L.A. is requested to advise.

2. As a rule no special formality is required ^rfor the appointment of an agent. Admittedly Shri Sunderdas who is the sole proprietor of the firm of Messrs. Rajendra Bros has appointed Shri Kapoor as his manager to attend to the business of the firm and particularly to all transactions in respect of the supply of salt to the Fish Curing Yards at Ratnagiri, under the contract dated 30-9-50 entered into by him with the State of Bombay. In short the relation of Shri Kapoor with the firm was that of a duly constituted agent with authority to conduct the business of the firm under the ~~x~~ said contract. Section 188 of the Indian Contract Act in this behalf provides that an agent having an authority to do an act has authority to do every lawful thing which is necessary in order to ~~do every lawful thing which is necessary in order~~ to do such act. It further provides that an agent having an authority to carry on business has authority to do every lawful thing necessary for the

purpose or usually done in the course of conducting such business. In pursuance of that authority Shri Kapoor used to sign money bill and accept payment and pass receipts for money received on behalf of the ~~firm~~^s firm from the Director. Shri Sunderdas doe^s not deny this. What has been objected to by Shri Sunderdas is the departure in the mode of making payment from cheque to cash, as a result of which he contends he has suffered the loss. This contention of his has no substance. It has been held that where an agent has been authorized to receive payment of money on his principal's behalf in order to bind the principal, must be in cash, unless it can be shown that by a reasonable custom or usage of the particular business in which the agent is employed, payment may be made in some other form, as for instance by cheque or a bill of exchange . (see Indian Contract Act: by Pollock & Mulla p. 538). Since Shri Kapoor was authorised to conduct the business of the firm and therefore he had an authority to receive payment on behalf of the firm there is nothing unusual in the payment made to him in cash. Government, therefore, would not be legally liable to Shri Sunderdas for the loss suffered by him on account of misappropriation by Shri Kapoor of the amount received from the Director.

3d/-

Remembrancer of Legal Affairs.

U.R. to D.D., "o. 745-Conf1., dated the 28th July 1951

EVY. 11/7.

R.I. No. $\frac{10243}{24-5-52}$ $\frac{14935}{18-7-52}$

Legal Department.

The question raised for the R.LA's consideration is whether the demurrage charges of Rs. 3608-3-0 can be recovered from Messrs. K.T. Rolling Mills Ltd. The recovery of the demurrage could be only by way of damages. Ordinarily damage may be of two kinds. Damage arising out of the breach of contract and damage remotely connected with the breach of contract. The principle of law that damage established from a breach of contract can be recovered, while damage which is remote cannot be recovered is embodied in section 73 of the Indian Contract Act which runs as follows:-

"Where a contract has been broken the party who suffers by such breach is entitled to receive from the party who has broken the contract compensation for any loss or damage caused to him thereby which naturally arose in the usual course of things from such breach or which the parties knew when they made the contract to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach." The question that would, therefore, arise is whether there has been any breach of contract and if so whether the damage in respect of demurrage would arise directly from that breach.

It appears that the Executive Engineer, Ahmedabad Division received a permit in favour of Messrs. K.T. Rolling Mills Ltd. from the Rationing Officer, Bombay for the supply of 22 tons of steel for the work of constructing constabulary quarters for policemen at Ahmedabad. He forwarded the permit to the Executive Engineer, Presidency Division, Bombay, for collection of materials. The Executive Engineer, Presidency

Division, it appears, enquired from Messrs. K.T. Rolling Mills Ltd. about the terms and conditions. Messrs. K.T. Rolling Mills Ltd. supplied a form containing the terms and conditions. That form was addressed to the Executive Engineer, P.W.D. Ahmedabad, on the assumption that the supply was to be made to him. Condition 2 required the Executive Engineer to specify whether the despatch of the materials should be made to Ahmedabad, and if so, a deposit in cash or by a cheque draft on a Bombay Bank for Rs. 8360/- must be made before the expiry date of the permit, subject to the condition that the materials would be despatched and the bills and railway receipt would be sent to him together with any amount that might be due to him after the adjustment of the Accounts. The Executive Engineer, Presidency Division wrote on 31st July 1950 that as per condition 2 of the form (reference) a cheque for Rs. 8360/- was forwarded requesting that the materials in question should be despatched direct to the Executive Engineer Ahmedabad Division, P.W.D. under intimation to his office, that is, the office of the Executive Engineer, Presidency Division. The actual cost of steel having amounted to Rs. 8461-9-0, the Company sent the railway receipt by V.P.P. for Rs. 101-9-0 to the Executive Engineer, Ahmedabad Division. The V.P.P. was refused by him as its contents were not known and subsequently the company informed the Executive Engineer that the V.P.P. contained railway receipt of the goods and, on hearing this, the Executive Engineer tried to arrange to take delivery of the materials with a view to a void demurrage charges. But this could not be done as the goods were consigned to self. A special man was sent to receive the railway receipt from the Company and the delivery of the goods was taken by the Executive Engineer thereafter and he had therefore to pay Rs. 3608-3-0 as demurrage charges. It is admitted that the goods were to be sent to the Executive Engineer

Ahmedabad Division. It is also admitted that the payment of Rs. 8360/- was a provisional payment with the result that the company was entitled to claim the balance, if any. As usual the goods were sent by railway and the railway receipt was sent by V.P.P. for the recovery of the balance. So far the Company followed the usual course and no breach of contract was involved. The only objection that has been raised by the Executive Engineer, Presidency Division, is that when the goods were sent the company should have given an intimation to his office as desired in his letter dated the 31st July 1950. It is true that the Company should have done it, but the question is whether it formed a material part of the agreement. In my opinion, it is not so. The Executive Engineer, Presidency Division placed an order with the Company on behalf of the Executive Engineer, Ahmedabad, and it was his duty to inform the Executive Engineer, Ahmedabad that the V.P.P. from the Company was in respect of the goods for which the order was placed on his behalf by the Executive Engineer, Presidency Division. Besides, it appears that the Executive Engineer, Ahmedabad, did not take any action in the matter for a pretty long time until the Company wrote to him. This involved the delay of 3 weeks. The Executive Engineer, Ahmedabad, should have written immediately to the Company or the Executive Engineer, Presidency Division, enquiring about the railway receipt which he failed to do. Further, even after the Company wrote to the Executive Engineer, Ahmedabad Division, that the railway receipt related to the goods for which the order was placed by the Executive Engineer, Presidency Division, still he took no active steps to get the railway receipt immediately from the Company. In these circumstances, it appears that it would not be possible to hold the Company ..

15A.

liable for the damage which arose indirectly from the breach of the contract, if at all the failure to give an intimation to the Executive Engineer, Presidency Division, about the despatch of the goods would be construed a breach of the contract.

Sd/-

Additional Secretary to Government.

U.R. to P.W.D., No. 14104, dated the 4th September
1951.

EVY. 12/7.

Legal Department.

The preamble of the Agreement executed between the Governor of Bombay and the contractor Duleral & Co. Appollo Street, Bombay, states that the contractor has tendered to the Governor for the supply to the Director of Industries and Central Stores Purchase Officer, Bombay, of the articles specified in the first column of the Schedule thereunder written for the period of one year commencing from the 1st day of April 1948 and ending on the 31st March 1949 at the respective prices or rates mentioned opposite to the said articles in the second column of the said Schedule and that such tender has been accepted.

2. In the Schedule the rate F.O.R. Nasik is specified at Rs. 2/13/- per set of shooks while the rate F.O.R. Bombay is stated at Rs. 2/8/6 per set of shooks. Clause 1 of the Agreement provides: "The contractor shall, during the period of this Agreement supply to the Director on behalf of the Governor the articles specified in the Schedule in ~~x~~ such quantity or quantities as may from time to time be required in writing by the Director and shall deliver such articles to the Superintendent, Government Central Distillery, Nasik Road, immediately on receipt of written requisition from the Director or within 15 days after any such requisition".

3. Clause 3~~x~~ provides: "All deliveries shall be made by the contractor at his own charges and expenses at the Distillery Nasik Road, with all possible expedition or upon such date or within such time as shall be specified by the Director in the written requisition".

4. Clause 5 provides: For all articles supplied and accepted by the Director or Superintendent under

this Agreement the contractor shall submit to the Superintendent, before the expiration of one English calendar month from the date of delivery of the same, bills in duplicate etc.

5. Reading these provisions together, it appears that although clauses 1 and 3 do contemplate the delivery of these articles at the Distillery Nasik Road, which means the delivery to the Superintendent, Government Central Distillery Nasik Road, clause 5 does appear to contemplate the supply of articles also ^{to} the Director of Industries. This is further reinforced by the fact that different rates have been specified in the Schedule for delivery at Nasik Road and in Bombay. The only possible way to reconcile these provisions of the Agreement would be to hold that it is competent for the Director to direct delivery of the articles either to him in Bombay or to the Superintendent, Government Central Distillery at Nasik Road. The agreement did not provide for an option for the contractor to deliver the goods either at Bombay Nasik. In the present case, it appears, a requisition for the supply of the first lot of 30,000 shooks was made to the Company on 17-4-1948 and the shooks were however delivered to the distillery in batches during the period 1-6-1948 to 31-8-1948, and of the 37,695 shooks delivered only 5300 were despatched by goods and the balance despatched either by lorry or by passenger train, the Company claimed and was paid extra freight charges of Rs. 8719-11-0 representing the difference between the cost of the transport of goods train and . Before the Company despatched the shooks by passenger train that by passenger train/it wrote to the Director of Industries on 27th May 1948: "The Superintendent, Government Central Distillery, Nasik, is pressing for the supply of the shooks which can be seen from the various telegrams received from him. In view of

the urgent need of the shocks, we may be allowed to sent them by passenger train to Nasik by which method the supply of shocks can be made regularly. The difference between the freight by passenger and goods train may kindly be made ~~at~~ to us. In case booking of goods train is available, we will immediately revert to the original system". The Director of Industries, by his letter dated 3rd June 1948, replied. "In the circumstances stated by you, you are requested to send the shocks by passenger train so as to have the regular supply thereof to Nasik Distillery. The difference between the freight by passenger and goods train can be claimed by you from the consignee. I note that as soon as booking by goods train is available, you will revert to the original system." It is clear from this correspondence that the Director of Industries did not ask the Company to delivery the shocks to him in Bombay, nor did the Company offer to make such delivery in Bombay. ~~I~~ It was taken for granted by both parties that the delivery was to be made at Nasik Road. Besides, as pointed out earlier, the agreement did not allow the contractor to insist on delivery being made at Bombay. Since the deliveries were made at the Distillery, Nasik Road, the contractor could claim the rate or Rs. 2-13-0 F.O.R. Nasik and would not be entitled to claim extra freight charges of Rs. 8,719-11-0, the difference between the cost of transport between the goods and that by passenger train.

Sd/-

Additional Secretary to Government.

U.R. to F.D., No. 280-Confl., dated the 14th March 1951
1.

Legal Department.

Shri Oak served as a drawing teacher for a period of nearly eight years in the S.H.A. Rais High School, Bhiwandi. One of the rules framed by the Konkani Muslim Education ~~Muslim~~ Society which conducts the school provides that no teacher shall leave service without giving a calendar month's notice in the case of temporary teachers, and a school term's notice in the case of permanent teachers and every teacher who leaves without such notice is liable to forfeit to the Society a sum equal to one month's pay. Shri Oak failed to give notice of his intention to leave the school but surrendered one month's salary. His provident fund account was governed by the Bombay Secondary Schools Employees' Fund Rules embodied in G.R.E.D. No. 933, dated 3-8-1948. Rule 13(a)(1) of these Rules provides inter alia that if an employee quits service without due notice he shall be entitled to receive only the sum which he has himself subscribed and the interest thereon. An employee who quits service after due notice and after a completed service not less than five years is entitled to receive, in addition to the sum which he has himself subscribed and the interest thereon, the management's contribution and the interest thereon, and Government's contribution. Shri Oak's contention in this case is that he served the school for more than five years and that in lieu of notice as required by Society's rules he surrendered a month's salary and that therefore his case is covered by rule 13(a)(ii) of the Bombay Secondary Schools Employees' Fund Rules. The E.D. is inclined to accept this contention. The R.L.A. is however requested to advise.

2. The argument put forth by Shri Oak is not correct. He cannot lay claim to the Management's and Government's contribution to his provident fund account.

Under rule 13(a)(1) an employee is entitled to receive only the sum which he himself has subscribed and interest thereon if (i) he is dismissed, (ii) is removed from service, (iii) quits service without due notice or (iv) quits it before ~~completing~~ completing five years' service. But the above conditions are independent of each other, and as he quitted service without due notice, his case, notwithstanding that he put in more than five years' service, will fall under (iii) above. According to the Rules regulating the conditions of his service, Shri ~~Oak~~ Oak was liable to the penalty of forfeiture of one month's salary for quitting service without notice. The fact that he has forfeited one month's salary under the Rules regulating his service would not however absolve him from complying with the Rules of the provident Fund of which he was a member, to entitle him to claim the benefit ~~of~~ of the management's and Government's contribution. As he quitted service without due notice under rule 13(a)(1) he is entitled only to his own contribution plus interest thereon. In other words Shri Oak had entered into two different and independent contracts and in case of quitting service without due notice, one of them provided the penalty of loss of one month's salary and other provided the penalty of loss of management's and Government's contribution to his provident fund. The fact that Shri Oak had paid the penalty under the first contract would not absolve him from liability to the penalty under the second contract.

Sd/-

Additional Secretary to Government.

E.D. No. 9274, dated the 12th June 1951.

EVY. 12/7.

Legal Department.

The question raised by the P. & S.D. for the consideration of the R.L.A. is whether it would be feasible for Government to recover from Shri Edroos the amount of Rs. 18,486-6-9 due on account of his suretyship.

2. It may be stated in the first place that the statement in para 2(2) of the P. & S.D. office note that Rs. 11167-2-0 are due from the other contractors is not correct. The correct amount appears to be Rs. 18,486-6-9. Shri Edroos's case has been considered by the R.L.A. formerly on two occasions. Attention is invited to R.L.A.'s opinions Nos. 11651, dated 19-10-49 and 15906, dt. 14-11-1950. The contention of Shri Edroos is that he stood surety for other forest contractors in accordance with the custom which was then in vogue in the Janjira State and that the State Administration did not take any steps to recover the dues from the forest contractors themselves. Both these contentions have no force at all. The suretyship bond is amongst the papers forwarded but presumably he must have undertaken to be bound by the liability of the other forest contractors to the State. Under the principles of the law of contracts the liability of the surety is co-extensive with that of the principal debtor unless there is a provision to the contrary and the creditor is not bound to exhaust his remedies against the debtor before proceeding against the surety. It is presumed that the contract does not provide that the State should first attempt to recover the amount from the principal debtors. In that case there would appear no legal objection to including this amount in the dues to be recovered from Shri Edroos.

Sd/-

Additional Secretary to Government.

Legal Department.Sale of Coupes

Whether acceptance of tender is sufficient to create binding contract.

It appears that the coupes in the Kolaba Forest Division including Janjira and Sudhagad were advertised for sale by invitation of tenders by the Jahirnama dated the 1st July 1951 a copy of which is at slip N below. In pursuance of this Jahirnama Messrs. Mahadeo Krishna Dongare & Sons submitted tender for five coupes offering to purchase them at the prices mentioned but subject to a condition which was as follows:-

"If we secure Nenavli Ghera and Nenavli we do not want Nagshet Ghera and Nagshet coupes; we want Dhokshet if secured." One Shri Vishwanath N. Karpe had also submitted a tender for five coupes including Nenavli Ghera and Nenavli. The price offered by Shri Karpe for these two Nenavli coupes was lower than that offered by Messrs. Mahadeo Krishna Dongare & Sons. The D.F.D., however, accepted the offer of Shri Karpe in respect of these two coupes and the sale was sanctioned by the Conservator of Forests, Central Circle, under powers delegated to him under Serial No. 62-II(2) of the Manual of Financial Powers. A complaint has been received by Government in respect of these sales and as the requisite agreements have not been executed in respect of these sales, the R.L.A. is requested to advise whether the sale can be held binding on Government in spite of the fact that no agreements have yet been executed.

2. According to para 8 of the Jahirnama whereunder the tenders were invited, the tenders were informed that it was in the discretion of Conservator of Forests, Central Circle, whether

or not to accept the tenders. Further according to para 16 of the Jahirnama, it was provided that the person whose tenders were accepted would be called contractors and that they were to deposit prescribed amounts within one week from the notice of acceptance. According to para 17 of the same Jahirnama, the contractors are required to execute a Kabulayat in the prescribed form. Though according to the terms of the Jahirnama it was incumbent upon the party to execute a Kabulayat, it does not appear that absence of the Kabulayat would vitiate the contract which has already been concluded by the acceptance of the tender by the Conservator of Forests. Where parties agree to the terms but subject to the preparation and execution of formal document, the question whether parties will be bound by the contract in the absence of the formal document depends on the intention of the parties (Cayley v. Walpole (1870) 39 L.J. Ch. 609). It is a question of construction whether the execution of the further document is a condition or term of the bargain without which there cannot be a binding contract or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through, in which case, there will be a binding contract and reference to the mere formal document may be ignored (Currimbhoy vs. Crest 35 Bom. L.R. 223 (P.C.,)). Where parties have come to an agreement the mere fact that they intended to embody the terms in a formal document does not make such agreement the less binding (vide the law of Contracts, by T.S.V. Iyer, 3rd Ed. pp. 64-65). The prescribed form of Kabulayat which the contractors

were expected to sign is not forwarded with these papers and it is not known what conditions and terms are contained therein. But applying the principles stated above, it appears that execution of the Kabulayat was not intended to be a condition or term of the bargain; and in the circumstances, a binding contract appears to have already come into force, even though no regular Kabulayat has been executed by Shri Karpe.

Sd/-

Additional Secretary to Government.

U.R. to A. & P.D., No. 15030, dated the 20th

September 1951.

EVY. 12/7.

Legal Department.

As regards the first claim of the contractor the view taken by the P.W.D. is correct. There was no condition in the terms of the auction that the contractor was to keep at the stand and look after Government owned cycles free of charge. Condition 6 of the contract only provided that "Government Servants' cycles" shall be charged at half the rate charged to outsiders. The expression "Government servants' cycles" obviously refers to cycles owned by Government servants. In the absence of any condition in the contract providing for the custody by the contractor ~~from~~ of Government owned cycles free of any charge, the contractor's claim to compensation appears to be justified.

2. As regards the second claim, if it is correct that the contractor was in fact in possession of the stand and had actually been collecting charges from the date of the commencement of this contract, there is no case for compensation on this account.

Sd/-

Additional Secretary to Government.

U.R. to P.W.D., No. 15972, dated the 8th October 1951.

EVY. 12/7.

Legal Department.

Both Mrs. ^mAmena Bibi and Mrs. Khatizabibi were it appears given loans of Rs. 6564-14-0 and Rs. 6366-8-0 for their maintenance in India after they entered India as evacuees from Burma. They have executed agreement as at slip A. By this agreement they undertake to repay in full, on demand to the Governor General of India in Council or as he may direct, the amount expended by Government on their account for their maintenance and accommodation while in India. They have certain property in Burma and if decrees are obtained, it is expected that the amount could be recovered by executing them in Burma. The question of execution in Burma, of decrees passed by an Indian Court, is still under consideration of the Government of India (p. 115). In view of the fact that the evacuees have executed agreements agreeing to pay the amount given to them as loans for their maintenance and accommodation and are at present residing in Bombay, there would be no difficulty ~~it~~ in obtaining the decrees against them. The presumption made by the Government of India in ~~this~~ their letter at p. 119 is correct.

Sd/-

Solicitor ~~of~~ to Government.

U.R. to R.H.D. No. 17589, dated the 6th November
1951.

EVY. 12/7.

Office of the R.L.A.

Interpretation
of Contract.

R.L.A.'s opinion
No. 8770 dt.
4-8-1949.

The view taken by the Superintending Engineer is not correct. The conditions in the specifications are as much conditions of the contract as the printed conditions of the tender since^e the contractor undertakes to carry out the work in accordance with them (vide first para on p. 2 of the Tender). In the circumstance^s the conditions in the specifications will have to be taken into consideration while interpreting the contract. (See Baier vs. Chotalal 6 Bom. L.R. 948, Moharlal vs. Krishan 30 Bom. L.R. 415). It is true that condition No. 37 and clause 5 of the specifications relate to the same matter viz. variation in quantities but as the terms of both are not indentical^c a reconciliation has got to be attempted as pointed out by the R.L.A. in his opinion No. 8770 dated the 4th ~~Aug~~ August 1949. The Superintending Engineer's view that if the quantities exceed 20 %, the contractor will not be entitled to any compensation therefore in view of clause 37 is not correct. His reference to clause 14 is also not relevant. Clause 14 comes into operation only when there is any alteration or addition to the original specifications, drawings or designs. That clause provides that when there is such alteration #The contractor shall be bound to carry out the work in accordance with any instructions in this connection which may be given to him in writing signed by the Engineer-in-Charge and such alteration shall not invalidate the contract; and any additional work which the contractor may be directed to do in the manner above specified as part of the work shall be carried out by the contractor on the same terms and conditions in all respects on which he agreed to do the main work and at the same rates as are specified in the tender for the main work". This clause is not

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applicable when there is no alteration but when the quantities specified in the Schedule exceed the estimates. The only relevant clauses applicable in case of excess in the original estimated work are condition 37 of the tender and clause 5 of the specifications and if clause 5 of the specifications is considered as not carrying out the correct intention of the Department steps should be taken to suitably modify it. There is therefore no ground for reconsideration of the R.L.A's opinion No. 8770 dated the 4th August 1949 on this point.

Sd/-

Remembrancer of Legal Affairs.

U.R. to P.W.D., No. 18508, dated the 20th November 1951.

EVY. 12.7.

Legal Department.

The questions for R.L.A's consideration are:-

- (1) Whether a surety who has executed the bond in Form D can be allowed to revoke the guarantee of his own accord; and
- (2) whether for allowing a change of business to the loanee, it will be necessary to obtain the consent of the sureties.

A surety may be discharged either.

- (i) by the contract of suretyship being invalid of
- (ii) by the revocation of the contract of suretyship; or
- (iii) by the conduct of the creditor.

Under section 130 of the Indian Contract Act, 'continuing guarantee' as defined in section 129, may at any time be revoked by the surety, as to future transactions, by notice to the creditor. Where a contract, however, relates to a single transactions, and does not extend to a series of transactions, and if the liability is incurred, the contract of guarantee cannot be revoked. If, however, the liability has not been incurred, it is possible that the guarantee may be revoked by notice. As the contract in Form B relates to a single transaction, the sureties executing the bond in Form D cannot revoke the guarantee without the consent of the loanee and Government.

As regards the second question, under clauses (1) and (2) of the Agreement in Form B, the loanee agrees that he shall utilise the amount of the loan for the purpose stated in his application and shall not use it for any other purpose. It is implied in these conditions that the loan is granted for carrying on a particular business specified by the applicant and understood in that sense by the sureties.

Principle (2) laid down in Government Resolution, Rehabilitation Department No. R-39/B dated 18th August 1950 no doubt permits the officer concerned to permit the loanee to utilise the loan amount for "some other specified purpose" for which the loan under the scheme can be granted. Section 133 of the Indian Contract Act however provides that any variance made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance. It is clear that a guarantee will extend ~~ix~~ only to a liability precisely answering the description contained in the guarantee, and if any material variation is made in the terms the contract without the surety's consent, the surety will be discharged. Consequently if a loanee is allowed to change the business without the consent of the sureties executing the bond in Form D, they will be discharged from their liability as regards future transactions. If the sureties do not agree to the change of business, before permitting the loanee to utilise the loan amount for a different business, he should be asked to enter into a fresh agreement with two solvent sureties. The view taken by the Rehabilitation Department on both the points is correct.

Sd/-

Additional Secretary to Government.

U.R. to Rh. D. No. 18730, dated the 22nd November 1951.

EVY. 12/7.

Office of the R.L.A.

The question for R.L.A.'s consideration are:-

- (1) Whether the sureties who have already executed Bond in Form D would automatically be bound by the proposed change in the terms and conditions effected in the agreement and the mortgage bond without their knowledge and
- (2) whether a condition can be made in the loan ~~sum~~ document binding the loanee to abide by any subsequent terms and conditions that Government may impose.

As regards the first question, the position is considered in para 2 of R.L.A.'s opinion No. 18730 dated 22nd November 1951, and as stated therein the surety will be discharged as regards future transactions if any material variation, such as extension of the period of the loan, is made in the terms of the agreement without the surety's consent. (see section 133 of Indian Contract Act). The view expressed by the Secretary Rehabilitation Department is correct.

As regards the second question, the loanee agrees to utilise the loan amount for the purpose stated in the application and to repay the loan by such instalments as may be specified during the period fixed for repayment of the loan. A condition as proposed by the Rehabilitation Department would not only be vague and indefinite but will be held as changing the document from a bilateral agreement into one of the nature of a unilateral instrument.

Sd/-

Remembrancer of Legal Affairs.

U.R. Co R.H.D. No. 19463, dated the 4th Dec. 1951.

Legal Department.

Setting aside
 auction sale.

The auction sale in this case was held subject to the "conditions of sale" which are at page 2 of the case papers. There is no provision in these conditions to the effect that the highest bidder shall be the purchaser. On the contrary a right was reserved to the Officer holding the sale to refuse any bid without giving any reasons (vide condition No. 2 of the Conditions). It was, therefore, open to the Range Forest Officer to reject the higher bid and to accept the lower one for any reasons which he considered to be fit and proper. The Range Forest Officer was in the circumstances within his rights in ~~rejecting~~ rejecting the high bid and as the sale has been confirmed by the Conservator of Forests a binding contract has already come into force (vide Addl: Secretary's opinion No. 15030, dated the 20th September 1951). It would not, therefore, be possible for Government to set aside the sale.

Sd/-

Additional Secretary to Government.

U.R. to A. & F.D., No. 19154, dated the 29th November 1951.

EVY. 12/7.